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Recent Cases

C. A. H.

compelled to adopt any one, since they found the dividend involved a distribution of the *corpus*. The facts of the case show that the fund for distribution arose through the sale of a subsidiary of the company in whose stock a trust had been created. The branch was sold as a going business and any amount realized over and above the net worth may rightly be considered as goodwill. If the court had applied the book value test the same result would have been reached. The opinion quotes at length from *Holbrook v. Holbrook*,[10] the leading case on the Pennsylvania rule. If the extensive quotations are indications of the court's inclination, it may be assumed that, when the question is squarely presented, Washington will adopt the only reasonable and fair rule, the Pennsylvania rule, which has the support of reason and the numerical weight of authority R. W MAXWELL.

RECENT CASES

MASTER AND SERVANT — WORKMEN'S COMPENSATION — RIGHT TO SUE FOR MALPRACTICE OF PHYSICIAN. The interesting question of an employee's right of action against a physician for malpractice suffered in the treatment of injuries received in the course of his employment, when the employment is covered by the Workmen's Compensation Act is discussed in the recent case of *Williams v. Dale*, — Ore — 8 P. (2d) 578 (1932). There the workman received final compensation from the Industrial Commission over a year after the original accident. The injury in the meantime had been aggravated by the malpractice of the attending physician, but no report of the malpractice was at any time made to the commission. A majority of a department of the Oregon Supreme Court held that the final award must have completely covered the workman's situation as of that time and therefore must have compensated him both for the main injury and for any aggravation; that therefore the workman could not sue the physician and in effect recover double damages. One judge, dissenting, felt, because the malpractice was not reported to the commission, that the workman had not actually been paid for it and that this action should lie.

The rule seems well established that a workman may recover compensation for an aggravation of the original injury which is due to malpractice. This was true at common law· *Hunt v. Boston Terminal Co.*, 212 Mass. 99, 98 N. E. 786, 48 L. R. A. (n. s.) 116 (1912) and is the law under the Workmen's Compensation Acts, in most jurisdictions. *Yarrough v. Hines*, 112 Wash. 310, 192 P. 886 (1920) 8 A. L R. 503; 39 A. L. R.1276. The contrary rule is less frequent. *Ruth v. Witherspoon-Englar Co.*, 98 Kan. 179, 157 P. 403, L. R. A. 1916E, 1201 (1916) *Smith v. Golden State Hospital*, 111 Cal. App. 667, 296 P 127 (1931) and *cf. Viita v. Fleming*, 132 Minn. 128, 155 N. W 1077, L. R. A. 1916D, 644 (1916).

But whether the workman may himself sue the physician for the malpractice is a disputed and variously determined controversy on which the cases are not at all in accord. The general trend of the courts in interpreting the various statutes seems to allow the workman an election. He may either look to the Industrial Commission for an award covering both injury and aggravation, or he may ask for compensation for the original accident only, retaining a separate remedy against the attending physician for the damages resulting from the latter's malpractice. *Powlak v. Hays*, 162 Wis. 503, 156 N. W 464, L. R. A. 1917A, 392 (1916) *Lakeside Bridge & Steel Co. v. Pugh*, 206 Wis. 62, 238 N. W 872 (1931) and see *Polucha v. Landes*, 60 N. D. 159, 233 N. W 264 (1930).

Assuming this choice of remedies, a question arises as to the manner in which it should be exercised. Must the workman make his election clearly and unequivocally, or may he do so impliedly? In the principal case, *Williams v. Dale, supra*, mere failure to report the aggravation to the commission was not considered an election to sue the physician; there

[10] See note 1, *supra*.

the plaintiff presumably was examined at the time of the final compensation and paid according to his actual physical condition at the time. He was therefore held to have received all to which he was entitled.

It would seem reasonable in such a case to allow an action to proceed against the negligent physician, but to let the workman retain only the surplus over that part of his compensation award referable to the aggravation. This was allowed in *Hoffman v. Houston Clinic*, 41 S. W (2d) 134 (Tex. Civ App. 1931) As pointed out by the dissent in the principal case, it is necessary and desirable that the negligent physician be held liable to some one. Where, after payment of compensation, the statute provides for an automatic assignment from the workman to the commission of the claim against the physician, as in *Polucha v. Landes, supra*, it would seem that any surplus the commission might recover should be given to the injured laborer.

The only Washington case directly in point contains a much more startling doctrine. In *Ross v. Erickson Construction Co.*, 89 Wash. 634, 155 P 153, L. R. A. 1916F 319 (1916) the court held that compensation is an injured workman's only recourse where a physician's malpractice has increased his original injury. The rule is based on the evident purpose of the act to do away with all the law suits which formerly resulted continually from industrial accidents. Indeed, in that case, the worker was held to be still in the course of his employment as he lay on his bed in the hospital. Under the rule of this case, then, no suit can ever lie against the physician in favor of the workman who consequently has no election. This holding has apparently been followed only in *Roman v. Smith*, 42 F (2d) 931 (Dist. Ida., 1930). For an extended criticism, see an article by Prof. Paul A. Leidy in 29 Mich. L. R. 568, on Malpractice Actions and Compensation Acts.

Directly contra to *Williams v. Dale, supra*, is *Smith v. Golden State Hospital, supra*, where, although the employee had received compensation for the results of the malpractice he was nevertheless allowed to sue the physician, a rule which would certainly seem to allow double damages *Hoehn v. Schenck*, 221 App. Div. 371, 223 N. Y. S. 418 (1927) contains a similar holding.

The Workmen's Compensation Act of course always bars any action against the employer for the malpractice, whether it be brought on the theory that the aggravation is a proximate result of the original injury and therefore a part of it, or on the theory that the physician is the agent of the employer and that the employer is therefore liable for the physician's negligence. *Kirby Lumber Co. v. Ellison*, 270 S. W 920 (Tex. Civ. App. 1925) *Sarber v. Aetna Insurance Co.*, 23 F (2d) 434 (9th C. C. A., 1928) And generally any action is barred when the employer has already received industrial compensation for the whole injury including the results of the malpractice. *Vatalaro v. Thomas*, 262 Mass. 377, 160 N. E. 269 (1928) and *Revelle v. McCaughan*, 162 Tenn. 589, 39 S. W (2d) 269 (1931). A. A. K.

TRADEMARKS AND TRADENAMES—PERSONAL NAME—UNFAIR COMPETITION. The plaintiff company had, for fifty years, manufactured and sold malted milk in the powdered form, under the name "Horlick's Malted Milk," to retail dealers all over the United States. The defendant corporation, formed in 1928, by George F Horluck and Hans Horluck, under name of "Horluck's Malted Milk Shops, Inc.," opened shops in the larger cities in the state of Washington, where it sold malted milks. These shops were called "Horluck's Malted Milk Shops." In advertising defendant used the names "Horluck's Malted Milk," "Horluck's Malted Milk Shop," and "Horluck's Specialty Malted Milk Shop." Purchasers patronized defendant's shops believing them to be owned by plaintiff. Plaintiff and defendant are not in competition with each other. The Circuit Court of Appeals enjoined defendant from using the word "Horluck's," or "Horlucks," but not "Horluck," in connection with the business of selling malted milks, the court having found that the word "Horluck's," or "Horlucks," associated with the words "Malted Milk" caused confusion in the minds of the public. *Horlick's Malted Milk Corp. v. Horluck's, Inc.*, 59 Fed. (2d) 13 (C. C. A. 9th, 1932).

A person has a right to use his own name in connection with any business which he carries on, either alone or with others. *Brown Chem-*

ical Co. v. Myer* 139 U. S. 540, 11 Sup. Ct. 625, 35 L. ed. 247 (1891) *Howe Scale Co. v. Wychoff, Seamans and Benedict*, 198 U. S. 118, 25 Sup. Ct. 609, 49 L. ed. 972 (1904) *Lapointe Machine Co. v. J N. Lapointe Co.*, 115 Me. 472, 99 Atl. 348 (1916). The use, however, must be honest and with no intent to deceive the public, or cause greater injury to another than would necessarily result from the similarity in names. *Singer Manufacturing Co. v. June Manufacturing Co.*. 163 U. S. 169, 41 L. ed. 118 (1895) *Chickering v. Chickering and sons*, 120 Fed. 69 (C. C. A. 7th, 1903) *Carter v. Carter Electric Co.*, 156 Ga. 297, 119 S. E. 737 (1923) And, where a personal name has become associated in the minds of the public with certain goods or a particular business, so that it has acquired secondary meaning, it is the duty of a person with the same or similar name, subsequently engaging in the same or similar business, to take such affirmative steps as may be necessary to prevent his goods or business from being confused with the goods or business of the established trader. *Herring-Hall-Marvin Safe Co. v. Hall Safe Co.*, 280 U. S. 554, 28 Sup. Ct. 350, 52 L. ed. 616 (1907) *Waterman Co. v. Modern Pen Co.*, 235 U. S. 88, 35 Sup. Ct. 91, 59 L. ed. 142 (1914). And, for failure to so do, he may be enjoined from using the name. *Russia Cement Co. v. Le Page*, 147 Mass. 206, 17 N. E. 304, 9 Am. St. Rep. 685 (1888) *Chickering v. Chickering and Sons*, 120 Fed. 69 (C. C. A. 7th, 1903).

An important feature of the present case is the fact that the parties are not in competition with each other: one sells malted milk in the powdered form to retailers, the other sells malted milk in the liquid form to consumers. But the absence of active competition between the parties is not sufficient to deny relief, if, in fact, they are engaged in similar businesses, or, deal in articles of the same descriptive class or quality, and the public is actually deceived. *British American Tobacco Co. Ltd., v. British American Cigar Stores Co.*, 211 Fed. 933, Ann. Cas. 1915B, 363 (C. C. A. 2nd, 1914) *Aunt Jemima Mills Co. v. Regney and Co.*, 247 Fed. 407 (C. C. A. 2nd, 1917) *Ward Baking Co. v. Potter Wrightington*, 298 Fed. 398 (C. C. A. 1st, 1924) *Vogue v. Thompson-Hudson Co.*, 300 Fed. 509 (App. D. C. 1924). Most of these cases involve tradenames other than personal names of the parties and there seems to be no authority for enjoining the use of a person's own name where there is no competition. The granting of an injunction in the instant case, seemingly correct on principle, goes beyond decisional law up to date. A contra result was reached in *Borden Ice Cream Co. v. Borden's Condensed Milk Co.*, 201 Fed. 510 (C. C. A. 7th, 1912), the court requiring actual competition between the parties. In many recent cases, not involving personal names, the above case has been adversely criticised as being out of harmony with the modern law of unfair competition. *Standard Oil Co. of New Mexico v. Standard Oil Co. of California*, 56 Fed. (2d) 973, 977 (C. C. A. 10th, 1932) *Willys Overland Co. v. Akron Overland Tire Co.*, 268 Fed. 151 (D. C. Del) 1920) *Rosenburg Bros. v. Elliot*, 7 Fed. (2d) 962 (C. C. A. 3rd, 1925) *Finchley Inc. v. Finchley Inc.*, 40 Fed. (2d) 736 (D. C. Md. 1929) *Kotabs Inc. v. Kotex Co.*, 50 Fed (2d) 810 (C. C. A. 3rd, 1931). Hence, the *Horlick Case* must be taken to be clearly in accord with the modern trend.

C. A. H.

NEGLIGENCE OF INDEPENDENT CONTRACTORS—LIABILITY FOR INJURIES TO THIRD PERSONS—FIRE AS DANGEROUS AGENCY. Defendant, wishing to enlarge the grounds appurtenant to one of its public schools, purchased several additional lots and contracted with Trester to remove certain frame houses on this property and to clean the premises. The defendant obtained a fire permit to burn the rubbish which accumulated from the destruction of these buildings. Due to the negligence of Hart, one of Trester's employees, the fire spread to plaintiff's property, thereby causing damage. In holding the defendant liable for the damage to plaintiff's property the court gave two reasons for their holding. First, fire is a dangerous agency and a person who contracts for the performance of work which necessarily involves the use of fire cannot escape liability for the negligence of the independent contractor. Second, the court suggested that Rem. Comp. Stats. Sec. 5647 is applicable. *L. A. Babcock et al. v. Seattle School District No. 1*, 68 Wash. Dec. 474, 12 Pac. (2d) 752 (1932)

Rem. Comp. Stats. (1922) sec. 5647, provides: "If any person shall for any lawful purpose kindle a fire upon his own land, he shall do

it at such time and in such manner, and shall take such care of it to prevent it from spreading and doing damage to other persons' property as a prudent and careful man would do, and if he fail so to do he shall be liable in an action to any person suffering damage thereby to full amount of damage."

This statute imposes a personal duty on the land owner to use reasonable care to prevent fire from spreading to adjoining property. The performance of a personal duty imposed by statute or ordinance cannot be delegated to another person so as to relieve the one on whom this duty is placed of the liability resulting from its non-performance, *Moore v. Dresdon Investment Co.*, 162 Wash. 289, 298 Pac. 465 (1931). Sec. 5647 is practically identical to a statute in Maine, R. S. C. 30, Sec. 17, which was discussed in *Lindsay v. McCaslin*, 122 Atl. 412 (Me. 1925), where the court held that the statute imposed a non-delegable duty on the land owner to use reasonable care to prevent the spread of fire to adjoining property, thereby including statutes of this nature, dealing with fire, within the group construed by the courts as imposing a non-delegable duty

The other ground for holding the defendant liable was that fire is a dangerous agency and is properly classed with those acts which are inherently or intrinsically dangerous, which forms a well recognized exception to the general rule of non-liability for the negligent acts of an independent contractor. This exception is recognized in *Kendall v. Johnson*, 51 Wash. 477, 99 Pac. 310 (1909), which dealt with the use of explosives by an independent contractor.

There is no direct authority in Washington on the question of whether or not fire is to be included in this exception to the general rule of nonliability for the negligent acts of an indpendent contractor. In attempting to justify their conclusion that fire is intrinsically dangerous the court cites *Van Slyke Warehouse Co. v. Vilter Mfg. Co.*, 158 Wash. 659, 291 Pac. 1103 (1930) as authority for the position that fire is included within the above mentioned exception. It seems rather difficult to agree with the court's interpretation of *Van Slyke Warehouse Co. v. Vilter Mfg. Co.* since that case was decided on the basis of the assumption of a positive duty by contract which could not be delegated to a sub-contractor so as to relieve the original contractor of liability for negligent performance, citing as authority for that proposition, *Schutte v. United Electric Co.*, 68 N. J. Law 435, 53 Atl. 204 (1902) where the court held that if A contracted with B for the performance of certain work and B subcontracted the work to C, then B would be liable to A for the negligent performance by C.

It is interesting to notice that the other jurisdictions are not in accord on the problem involved in this case. One group of cases hold that fire is intrinsically dangerous and include it within the exception to the general rule of non-liability for the acts of an independent contractor. *Black v. Christchurch Finance Co.*, 1894 (A. C.) English Law Reports 48; *St. Louis and S. F R. Co. v. Madden*, 93 Pac. 586 (Kansas 1908) *Lindsay v. McCaslin*, 122 Atl. 412 (Me. 1925). Other cases refuse to consider fire intrinsically or inherently dangerous. *Ferguson v. Hubbell*, 97 N. Y. 507 *Shute v. Town of Princeton*, 58 Minn. 337, 59 N. W 1050 (1894) A third view is stated in *St. Louis R. Co. v. Yonley*, 53 Ark. 503, 14 S. W 800, 9 L. R. A. 604 (1890), where the court takes the position that where the owner or occupant of land causes or permits fire to be set thereon to accomplish a desired result, under such conditions that the act of then setting fire necessarily endangers the property of others, unless proper precautions are taken, a duty arises to take such precautions, which cannot be avoided by delegating the work to an independent contractor. The circumstances of each case are to be examined and if they are such that fire will necessarily endanger adjoining landowners, then that particular fire will be considered intrinsically dangerous and will be included within the exception to the general rule of non-liability for the negligent acts of an independent contractor.

The last view seems to be preferable and our court has adopted this view in dealing with the liability of an employer for injuries to third persons due to negligence of independent contractors in blasting. *Kendall v. Johnson*, 51 Wash. 477, 99 Pac. 310 (1909) *Freebury v. C. M. & P S Ry Co.*, 77 Wash. 464, 137 Pac. 1016 (1914) H. H.